No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A/ NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR MASSACHUSETTS CITIZENS FOR LIFE, ELEANOR MCCULLEN, EXPECTANT MOTHER CARE, AND THE PRO-LIFE LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Massachusetts Citizens for Life, Inc. (MCFL), is a not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts that is dedicated to furthering the protection of human life from conception until natural death. As such, MCFL is opposed to government regulations such as the one at issue here, which would mandate the provision of information on how to obtain an abortion.

Eleanor McCullen has a pro-life counselling ministry in Massachusetts and was the lead plaintiff in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). As such, she is against any regulation that mandates the promotion of abortion services or inhibits the ability of private pregnancy centers to spread a pro-life message.

Expectant Mother Care (EMC) is a non-profit organization that is registered in the State of New York and that operates a network of pro-life centers that offer alternatives to abortion. As such, EMC is against any government regulation that mandates the promotion of abortion services.

The Pro-Life Legal Defense Fund, Inc. (PLLDF), is a Massachusetts not-for-profit

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Petitioners' letter evidencing blanket consent has been filed with the Clerk of the Court, and all other parties have granted consent. Furthermore, pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did such counsel or party make a monetary contribution to the preparation or submission of this brief. Only *Amici Curiae* made such a monetary contribution.

corporation, which provides pro bono legal services for the protection of human life. As such, PLLDF opposes coercive government practices such as the State of California's mandate that pro-life pregnancy centers provide information on how to obtain an abortion.

SUMMARY OF ARGUMENT

The Court should apply strict scrutiny to the California Reproductive FACT Act ("the FACT Act") because the regulation is content-based and does not regulate commercial speech. Even if the FACT Act is found to regulate professional speech, the Act should still be subject to strict scrutiny because the speech at issue is not motivated by a pecuniary interest.

ARGUMENT

Content-based regulations of speech are subject to strict scrutiny, *see Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), unless the regulated speech is commercial, *see Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571–72 (2011); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 501 (1996); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), in which case intermediate scrutiny may apply. Even if the regulated speech is professional speech, strict scrutiny applies if the speech is not motivated by pecuniary interest. *See In re Primus*, 436 U.S. 412, 430 (1978) (applying strict scrutiny to regulation of

an ACLU lawyer's solicitation of clients when not motivated by pecuniary interest). Because the FACT Act is a content-based regulation of speech that is not commercial speech, the FACT Act should be subject to strict scrutiny. Even if the regulated speech were professional speech (which *Amici* do not concede), strict scrutiny should still apply because the speech in question is not motivated by a pecuniary interest.

I. The California Reproductive FACT Act's regulations are content-based.

The Ninth Circuit properly found that the FACT Act is a content-based regulation. *See Nat'l Inst. of Family & Life Advocates ("NIFLA") v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016) ("[T]he [FACT] Act is a content-based regulation . . . ."). A regulation of speech is a "content-based regulation of speech" when the regulation "mandat[es] speech that a speaker would not otherwise make" because such a regulation "necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (U.S. 1988) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256). This is true regardless of whether the mandated speech is opinion or fact. *See Riley*, 487 U.S. at 797–98; *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."). Here, the FACT Act mandates speech which the pregnancy centers would not otherwise make. In particular, the FACT Act mandates that licensed pregnancy centers provide

information on whom to contact in order to obtain an abortion and requires that unlicensed non-medical pregnancy centers disseminate a notice stating that "[the] facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Cal. Health & Safety Code § 123472(b)(1) (West 2017). Therefore, the FACT Act necessarily alters the content of the pregnancy centers' speech and is thus a content-based regulation of speech. It is immaterial that the mandated speech is fact-based and not opinion-based. *See Riley*, 487 U.S. at 797–98.

Additionally, the FACT Act's regulation of licensed pregnancy centers is content-based because it favors some speakers over others in a way that reflects a content preference of the legislature. In particular, the FACT Act favors pregnancy centers enrolled in the Family PACT Program and reflects the legislature's preference for content that promotes awareness of access to abortion. Membership in the Family PACT Program requires providing abortifacient drugs. *See* Petition for Writ of Certiorari at 8–9, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. *petition for cert. filed* Mar. 20, 2017). Therefore, exempting members of the Family PACT Program from making the disclosures mandated by the FACT Act disfavors pregnancy centers that are fundamentally opposed to all forms of abortion, including abortifacients.

II. The California Reproductive FACT Act regulates non-commercial speech.

The Court has defined "commercial speech" as "speech that does no more than propose a

commercial transaction." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–762 (1976). Commercial speech can be subjected to greater governmental regulation than non-commercial speech because the State has an interest in protecting consumers from "commercial harms." *Sorrell*, 564 U.S. at 579 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)); *see also Liquormart*, 517 U.S. at 502–03. Additionally, commercial speech is not afforded the full protection of the First Amendment because it is "the offspring of economic self-interest" and therefore "a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Cent. Hudson*, 447 U.S. at 564 n.6 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)).

The Ninth Circuit properly held that the speech regulated by the FACT Act is not commercial speech. *See NIFLA*, 839 F.3d at 834 n.5. The pregnancy centers do not propose a commercial transaction; the centers are non-profit enterprises and offer their services free of charge. Their motivation is not economic, but moral or religious opposition to abortion. For this reason, the FACT Act does not regulate commercial speech. To hold that the pregnancy centers are engaging in commercial speech would transform a broad array of expressive action unconnected to economic self-interest into regulable commercial speech.

III. Even if the California Reproductive FACT Act regulates professional speech, it should be subject to strict scrutiny because the speech is not motivated by pecuniary interest.

Amici do not concede that the speech at issue is professional speech,[2] or that professional speech is a category of speech which is entitled to less protection under the First Amendment. However, even if the Court finds that the speech at issue is professional speech, the Court should still apply strict scrutiny because the speech at issue is not motivated by a pecuniary interest. This Court has held that the regulation of professional speech is subject to strict scrutiny when the professional speech is not motivated by a pecuniary interest. *See Primus*, 436 U.S. at 438; *see also NAACP v. Button*, 371 U.S. 415, 429 (1963). In *Button*, this Court applied strict scrutiny to a Virginia law that regulated the NAACP's activities because those activities were conducted not for pecuniary gain, but for the public interest. *See* 371 U.S. at 429. This Court further observed that regulations that are aimed at ensuring "high professional standards" rather than inhibiting free speech may still be subject to strict scrutiny and that states "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439.

Similarly, in *Primus*, the Court applied strict scrutiny to state regulation of the ACLU's provision

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[2] As argued by other *Amici*, "it is clear that the compelled speech at issue here . . . does not have any of the qualities that uniquely characterize professional speech." Brief for The Cato Institute as *Amici Curiae* Supporting Petitioners at 4, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. *petition for cert. filed* Mar. 20, 2017).

of free legal services when the ACLU was not "motivated by considerations of pecuniary gain." 436 U.S. at 430. Strict scrutiny was applied even though the ACLU, unlike the NAACP, did not have a near-sole focus on political activism. Unlike the NAACP, the ACLU had "as one of [their] primary purposes the rendition of legal services." *Id.* at 427. This Court noted that, although states may promulgate prophylactic speech regulations when attorney speech is made for monetary compensation, "significantly greater precision" is required for the regulation of attorney speech that is not for monetary compensation. *Id.* at 438.

Here, as in *Primus* and *Button*, Petitioners are providing services for free and, therefore, are not motivated by a pecuniary interest. Petitioner's provision of services is instead motivated by a moral opposition to abortion. Therefore, because Petitioners are not motivated by a pecuniary interest, the FACT Act's regulation of Petitioner's speech should be subjected to strict scrutiny.

IV. The First Amendment interest in protecting the right of speakers not to convey messages with which they fundamentally disagree weighs in favor of applying strict scrutiny to the California Reproductive FACT Act.

Freedom of speech requires the liberty to determine not only what to say, but also what not to say. *See Hurley*, 515 U.S. at 573; *see also Riley*, 487 U.S. at 797–98; *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that the State of New Hampshire could not require its citizens to display the state's motto of "Live Free or Die" on their vehicle license plates because the First Amendment protected the

right of individuals to hold a point of view different from the majority and to refuse to foster an idea they found morally objectionable).

The Court has recognized some spheres in which the State can compel speech. For instance, the State may "prescribe what shall be orthodox in commercial advertising." *Zauderer*, 471 U.S. at 651. However, the Court has upheld the permissibility of regulations on commercial entities on the basis of the argument that "appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." *Id.* Even in *Zauderer*, the Court recognized that regulations on commercial advertising may violate the First Amendment. *See id.* ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech"). In this case, the pregnancy centers do have an interest in not providing the information at hand, because directing clients to the location of abortion providers violates the moral purposes these pregnancy centers are established to uphold.

In the case of licensed pregnancy centers in California, the regulations in question represent a clear violation of the principles that this Court has used to decide previous cases of compelled speech. Particularly problematic is the requirement that licensed pregnancy centers must provide information directing potential clients to public clinics that provide abortions, as well as the contact information of such clinics. The entire *raison d'etre* of pro-life pregnancy centers is to provide services to pregnant women that help them move away from choosing an abortion. Requiring the pregnancy centers to

advertise for abortion providers—or to do anything that promotes abortion—forces them to promote a practice with which they fundamentally disagree.

Although the information the pregnancy centers are required to provide may be factual, sharing it requires the pregnancy centers to engage in the promotion of a procedure which they oppose. Moreover, this requirement is even more intrusive than those struck down in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), or *Riley*. In those cases, the Court held that the State could not require political campaigners or fundraisers to disclose information pertinent to their own professional activities. In *McIntyre*, the Court struck down an Ohio law requiring campaigners to share their own name and address in campaign literature, while in *Riley* the Court struck down a North Carolina requirement that charity fundraisers disclose percentages of funds retained. California's regulations go even farther, mandating that pregnancy centers provide information about the services provided by their competitors, namely public clinics. In so doing, these regulations use the power of the State to compel pro-life pregnancy centers to actively promote abortion by directing their clients to clinics that offer this procedure.

The combination of (i) the exemptions in the FACT Act that ensure that only pro-life centers are affected by it and (ii) the compelled speech requiring licensed pregnancy centers to spend their own funds, resources, space, and time to deliver a message that promotes abortions—thereby violating the central pro-life tenets of the pregnancy centers—favors applying strict scrutiny to the FACT Act.

CONCLUSION

For the foregoing reasons, and those presented by Petitioners, this Court should reverse the decision below.

Respectfully submitted,

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